WRITE A COMMENT Antworten abbrechen

verfassungsblog.de/al-bashir-flouting-court-orders-are-anti-poor-and-anti-democratic/

The decision by the South African government to ignore the order of the Gauteng High Court not to allow President Omar al-Bashir from North Sudan to leave the country, constitutes a deliberate, pre-meditated, act of contempt of court. The case raises many complex legal and geo-political questions over which reasonable people could profitably disagree. But even in an overheated political climate in which emotions tend to overpower principles and logic, it is unclear how any level-headed South African could support the deliberate flouting of a court order.

I am not a great fan of the International Criminal Court (ICC). Several years ago, just after Vusi Pikoli was suspended as National Director of Public Prosecutions (NDPP) I attended a conference in The Hague where several officials of the ICC were present. In private conversations, some of these officials did not impress me – I detected, and I make allowances for being hyper sensitive, a kind of cultural arrogance, bordering on racism emanating from some of the ICC officials.

However, in principle it must be possible to create a mechanism to prosecute political leaders of brutal authoritarian states who engage in crimes against humanity by facilitating mass torture, rape and ethnic cleansing. This is not an easy task because it will always be near impossible to bring to book the leaders of countries with the most economic and military power (I think here of the US, China and Russia, amongst others). In a world in which political, social and military power is not distributed equally, it is difficult to hold the most powerful human rights abusers to account.

Nevertheless the South African government decided to ratify the Rome Statute creating the ICC. It went further and became the first country in Africa to domesticate that treaty when its democratically elected representatives passed legislation to make the provisions of the treaty binding in South Africa. This occurred in 2002, eight years after South Africa became a democracy.

There are many cogent reasons for criticising the ICC, based on the fact that political considerations will prevent it from going after some politicians who are guilty of crimes against humanity. One could also argue on pragmatic grounds that it is unsound to arrest and prosecute a head of state because this would endanger the relative stability of the country over which he governs. Even when a leader is accused of facilitating the mass murder of his citizens – as President Omar Al-Bashir has been, with more than 200 000 people killed and more than 2 million displaced – grubby, unprincipled, pragmatic political considerations may militate against that President's arrest.

But international agreements are entered into voluntary by states. When South Africa signed and ratified the Rome Statute (which establishes the ICC) and when it passed legislation in 2002 to make its provisions applicable within South Africa it did so voluntary.

The democratically elected government of South Africa could have chosen not to sign on to the Rome Statute. It could have chosen to withdraw from it if it believed that the ICC was unfairly targeting politically, economically and military weak leaders from the African continent. That South Africa did not do. Instead, it remained a signatory to the treaty and retained the law making that treaty applicable in South Africa on the statute books. In the same manner it has passed laws prohibiting rape and corruption, it has passed a law prohibiting crimes against humanity and placing a duty to on the government to co-operate with the ICC.

Those who oppose the extradition by South Africa to the ICC of a tyrant who allegedly was instrumental in facilitating the rape and killing of hundreds of thousands of Africans, are really critical of the ANC government decision to adhere to these obligations.

Any lawyer worth his or her salt would also have been aware that any immunity granted in terms of the Diplomatic Immunities and Privileges Act of 2008 to foreign heads of state on the assumption that the AU is akin to the UN would be on shaky legal ground. The international instruments and the South African Act was always

likely to be interpreted to apply only to United Nations related personnel and was never likely applicable to the Presidents of foreign countries wanted by the ICC who attends an African Union summit in South Africa.

Although this area of the law is not well-settled, it was at least likely that a court would find that an attempt to grant immunity to President Omar Al-Bashir under this Act would not be legally valid and binding and would be trumped by South Africa's constitutional obligations and international law obligations in terms of the Rome Statute.

(I am not an expert on international law, so I find the various conflicting provisions of the Rome statute, its interplay with the South African Constitution and how this relates to customary international law norms, rather perplexing. But even a brief search on the internet informed me that at the very least this is a grey area of law and that it was at least likely that a South African court would not find the legal immunity purportedly granted under this Act to be legally valid.)

It was therefore always at best unwise and at worst inviting a complete diplomatic meltdown, for South Africa to give the go-ahead for President Al-Bashir to visit South Africa. It was also arrogant and recklessly endangering South Africa's standing on the African continent and in the international community not to warn President Al-Bashir that he may face legal consequences if he visited South Africa. If the South African government had explained that its laws may require it to arrest and extradite President Al-Bashir he would not have arrived.

Once an NGO approached the High Court about the matter and the High Court issued an order prohibiting President Al-Bashir from leaving until the matter was considered in full, the South African government had a full blown diplomatic crisis on its hands – entirely of its own making due to its arrogance and/or incompetence.

Then our government proceeded to make a bad situation worse by facilitating the departure of President Al-Bashir in clear and direct conflict with a court order not to do so.

Once a government flouts court orders it undermines the legitimacy of the courts – not only in highly charged political matters but also in ordinary matters affecting ordinary citizens. It is a calamity for every citizen – even if this may not at first be apparent to some citizens who might even, in a particular case, support the flouting of a court order and the lawlessness that it entails.

As former Chief Justice Sandile Ngcobo pointed out in a public lecture the judiciary needs to retain the public's confidence in order for it to fulfil its role properly. Public confidence was important, suggested Ngcobo CJ, because it is necessary for the effective performance of judicial functions. What was required was for members of the public to recognise the legitimacy of individual decisions of the court even when it disagreed with the outcome of such decisions: in other words, public opinion related to the institutional position of a court and hence courts had to act in such a manner that it retained the confidence – if not always full agreement – of the public it served.

When a democratically elected government flouts the orders of a court, it undermined public confidence in the courts and undermines the legal system as a whole. If members of the public come to believe that what matters is not what a specific legal principle require, but what those with money and power dictate, lawlessness in its most extreme form logically follows.

To quote former Chief Justice Ishmael Mahommed:

> *[u]nlike Parliament or the executive, the court does not have the power of the purse or the army or the police to execute its will. The superior courts and the Constitutional Court do not have a single soldier. They would be impotent to protect the Constitution if the agencies of the state which control the mighty physical and financial resources of the state refused to command those resources to enforce the orders of the courts. The courts could be reduced to paper tigers with a ferocious capacity to roar and to snarl but no teeth to bite and no sinews to execute what may then become a piece of sterile scholarship.*

It is important to the rule of law that people and governments develop such confidence in the judiciary that they routinely accept and comply with judicial decisions. This acceptance is most necessary in the case of decisions that are controversial and unpopular. Every day courts make decisions that injure or offend people. Of course, there is a greater good underlying these decisions — respect for the law, and the policy goals and the protection of rights that the law represents.

Yet that greater good is not always apparent to losing parties or to those who do not support the court order. And yet the rule of law depends upon peaceful acceptance of those decisions, and compliance with court orders, even if they are strongly resented. Here the argument, familiar for political scientists, seems to be that it would be difficult for a Constitutional Court (or the judiciary at large) to survive institutionally if its decisions were routinely ignored or flouted by those with power and with connections with those to power.

The result would be a system in which who you know and how much money you have is the only, the absolute only, determinant of whether you will enjoy the protection of the law or whether you are at the mercy of those with connections, money and power.

What the South African government did by flouting a court order preventing President Al-Bashir from leaving is to open the possibility to a situation that when a person with power thinks it appropriate, who you are, how much money you have, and who you know will determine whether your dignity will be respected or rejected and whether your basic rights will be vindicated or ignored. This state of affairs is not compatible with a constitutional democracy in which the inherent human dignity of all are protected.

It is especially destructive to those without money and with no access to politically connected individuals. It is an anti-poor and anti-democratic move which, if repeated, will destroy South Africa's democracy.

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